REASONS FOR DENYING THE PETITION

1. There is no division in the case authorities. The Third Circuit's decision is the only circuit court decision to construe the scope of Section 1114. Respondents have not found any other lower court authorities in any jurisdiction that involve an employer's deliberate attempt to bypass Section 1114 by terminating employees on the verge of retirement, and Petitioners cite none.

2. The decision by the Third Circuit arises out of an unusual set of circumstances and is *sui generis*. The facts that the Respondents were each over 65 years of age at the time of their termination, were former founders or senior executives, were being paid sharply reduced wages (three of the Respondents were being paid about $50 a week at the time of termination) and were terminated without case on the eve of their voluntary retirement render this narrow decision unsuitable to explore the parameters of Section 1114.

3. The Third Circuit's decision presents a preliminary issue that must be resolved before the Section 1114 issues may be considered, namely, is the Benefit Plan an executory contract within Section 365. If not, as the concurring opinion of Judge Pollak observed, Petitioners may not reject the plan. Two factors militate against the consideration of this issue here. First, neither party raised this issue in the courts below. The issue was first raised *sua sponte* by the Third Circuit during oral argument. Second, there does not appear to be any case authorities discussing whether a retirement benefit plan such as is involved at bar is executory or not.

4. A central argument by Petitioners — that the Debtors afforded Respondents several days' notice of their termination and Respondents could have voluntarily retired during that seven day period — was not raised by the Petitioners in any of the lower courts and has thus been waived.

5. Petitioners' deliberate manipulation of the Respondents' employment termination to evade the Bankruptcy Code protections for retirees and their benefits should bar their request for further judicial review of their actions and arguments.

6. The plain purpose of Section 1114 is to protect retiree benefits. The result below accomplished Congress' objectives in enacting the statute. As a result, and because only persons over 65 years of age at the time of termination are involved in the ruling sought to be appealed, this case is not one of exceptional public importance requiring further review in this Court.

7. The Third Circuit correctly ruled that Section 1114 prohibited Petitioners' actions:

A.

Here, retirement was the condition precedent to Respondents' receipt of benefits under the Benefit Plan. GDC, however, willfully prevented Respondents from voluntarily retiring by discharging them without cause and purporting to terminate their benefits, in violation of the Benefit Plan which specified the only instances in which Respondents could be deprived of benefits. Petitioners manipulated the timing of the pertinent events in order to

intentionally deprive Respondents of their contractually stipulated benefits and of the protections of Section 1114. It would be patently unfair to allow Petitioners to discharge without cause senior executives and founders, each over 65 years of age, working on limited projects and some for $50 a week, one day after making its 365 Motion, for the sole purpose of foreclosing their retirement and depriving them of benefits protected by the Bankruptcy Code.

See 5 Williston on Contracts § 677, at 224 (3d ed. 1961) ("It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure").

> One who unjustly prevents the performance or the happening of a condition of his own promissory duty thereby eliminates it as such a condition. He will not be permitted to take advantage of his own wrong, and to escape from liability for not rendering his promised performance by preventing the happening of the condition on which it was promised.

3A Corbin on Contracts § 767, p. 540.

Petitioners' argument that Respondents had several days' advance notice of their termination and could have voluntarily retired before the 365 Motion is unavailing. First, as noted, this argument was not advanced in the courts below. Second, the notice did not inform Respondents that Petitioners intended to make a 365 Motion to reject their Benefit Plan the day before the planned termination (or at any other time).[3] Arguably, such

3. In fact, Petitioners stipulated that Respondents "received notice of the [365] Motion after November 30, 2001." Stipulated Facts, No. 1.

notice may have triggered an immediate voluntary retirement before said motion was made. Given Petitioners' contention that retirement status under Section 1114 is measured as of the time the debtor seeks to reject retiree benefits (*see* Petitioners' Brief in Third Circuit, p. 16), their reliance on the purported notice — which gave no hint of the impending 365 Motion — is misplaced.

B.

The lower courts' determinations concerning Respondents "forced retirement" are sound and correct. "Retirement" is not confined to voluntary action. The word has numerous meanings, and, given the circumstances at bar, can reasonably be construed to mean, simply, a termination of employment, however that may be effected. Persuasive authorities support the Bankruptcy Court's finding of "forced retirement," as affirmed by the District Court and Third Circuit. Webster's Third New International Dictionary (1986) lists several meanings of the word "retire," including, as the definition of the verb transitive form of the word, "to cause to retire." Webster's gives the following as an illustration of the appropriate use of the word in context: "[O]nce a man is put on committee, he stays on it . . . until the voters [retire] him," at 1939. Burton's Legal Thesaurus (at 938) defines "retirement" to include termination and layoff. According to Roget's International Thesaurus (3d ed.), the words "retire" and "retired" are synonymous with such other words as "dismiss(ed)," "remove(d)," and "replace[d]." *Walker v. Montgomery County Council*, 223 A.2d 181, 183 (Md. 1966).

"[O]ne may retire or be retired voluntarily or involuntarily." *Walker*, *supra*, 223 A.2d at 183. In *Walker*, Maryland's High Court held that a judge who had not been reappointed had "retired" within the meaning of a statute providing for pension

benefits unless the judge retired, rejecting the judge's argument that he did not leave office voluntarily and thus could not have retired. Similarly, the Supreme Court of Washington held in *Zachman v. Whirlpool Financial Corporation*, 869 P.2d 1078 (Sup. Ct. Wash. 1994), that the statutory term "retired" included the re-election defeat of a sitting judge. State statute allowed a judge who had "retired" to sit on certain cases pending before him pro tempore without the consent of the parties. Rejecting a litigant's contention that "retired" is limited to voluntary retirement, the court broadly construed the term to include retirement by election defeat.[4]

More closely on point is *Vawter, Kennedy & Kennedy, P.C. v. Vawter*, 776 S.W.2d 520 (Sup. Ct. Tenn. 1989). There, after a partner in an accounting firm was terminated, he brought suit for redemption of his shares as a dissenting shareholder. State statute only allowed for redemption of the stock of a deceased, retired or disqualified shareholder. Ascertaining the intent of the legislature, the court held that plaintiff had retired, holding that the term "retire" included involuntary termination of employment. 776 S.W.2d at 522. The court further held that the legislature intended that when one ceases to be engaged in the profession as a member of a professional corporation, he is entitled to get his share of the business returned to him. The court cited the intermediate appellate court's dissent with approval:

> The trial court held that the word 'retired' or 'retirement' is a voluntary termination of

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4. Involuntary retirement is a familiar concept in such areas as employment discrimination and ERISA law. *See, e.g., Betts v. Hamilton County Board of Mental Retardation and Developmental Disabilities*, 897 F.2d 1380 (6th Cir. 1990), *cert. denied*, 498 U.S. 963 (1990).

> employment, and not involuntary termination of employment. I disagree. 'Retire' means to withdraw. *See Webster's Ninth New Collegiate Dictionary* (1986). It could be voluntary or involuntary.

776 S.W.2d at 522.

Walker, *Zachman* and *Vawter* inquired into the purposes of the schemes involved to ascertain the meaning of "retire" and held that including involuntary cessation of employment status would advance those purposes. The same result pertains here by defining "retirement" to include termination of long-time senior executives of the company without cause on whom were conferred retirement benefits which could only be stripped away upon certain contingencies, none of which here apply.

C.

That Respondents were still "employed" when Petitioners filed their 365 Motion (and discharged the next day) is irrelevant. Respondents were retired at the time they filed their Objection to the 365 Motion and at the time the Bankruptcy Court considered the 365 Motion. Section 1114 has no requirement that a covered employee must have been retired at the time of a bankruptcy filing, or at the time an application has been filed to modify or terminate retiree benefits, in order to invoke the protections of the statute.

Section 1114(a) contains the only temporal requirement of the statute – that the "plan, fund or program" be established prior to the bankruptcy filing, the case here.

In any event, since Petitioners did not comply with Section 1114, and, in fact, ignored that statute, they cannot argue that they had made "an application seeking modification of the retiree benefits" (*see* Section 1114(f)(1)) one day before Respondents were discharged and that Respondents thus lacked retiree status at the time Petitioners' 365 Motion was made. Even if Section 1114 had a requirement that an employee be retired at the time of an application to modify or terminate benefits under the statute, such a requirement is unavailing to Petitioners because they had never made such an application. *See* 7 *Collier on Bankruptcy*, ¶ 1114.02[2][a] at 1114-14 (15th ed. 1992) ("[s]ection 1114(e)(2) gives payment of retiree benefits status as an allowed administrative expense . . . regardless of when the right to receive such benefits vests").

Only two requirements need be satisfied before an employee can assert the protections of Section 1114: (i) that under any plan, fund or program maintained or established by the debtor prior to commencing the bankruptcy case, (ii) he or she is entitled to "retiree benefits," namely, entitled to payment for the purpose of providing or reimbursing payments for, *inter alia*, medical or hospital care benefits or benefits in the event of sickness, accident, disability or death. 11 U.S.C. § 1114(a). Both requirements were satisfied in this case.

To suggest that an employee must have been retired as of the time a debtor files a motion to terminate or modify retiree benefits finds no support in the language of the statute. Further, Petitioners' argument, if adopted, would invite the sort of manipulative and abusive actions that exist here. In enacting Section 1114, Congress intended to protect retiree benefits; it did not intend to allow creative efforts to extinguish them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 05-225

IN THE

Supreme Court of the United States

GENERAL DATACOMM INDUSTRIES, INC.,

Petitioner,

v.

JAMES R. ARCARA, FREDERICK R. CRONIN, ROBERT S. SMITH, and THOMAS L. THOMPSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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PRELIMINARY STATEMENT

The Petitioner, General DataComm Industries, Inc. ("GDC" or "Petitioner"), respectfully submits this Reply Brief pursuant to Supreme Court Rule 15(6). In accordance with that rule, this Reply Brief will only address new points raised in the Respondents' Brief in Opposition ("Resp. Br."). The Respondents' arguments that GDC deliberately attempted to evade the requirements of 11 U.S.C. § 1114, and that the Petitioner prevented the Respondents from retiring (Resp. Br. ¶¶5, 7A at 9-11) do not constitute new points and are addressed in GDC's Petition.

ARGUMENT

The Decision of the Third Circuit is Not *Sui Generis.*

The Respondents' argument that the decision in the case is limited to an alleged "unusual set of circumstances" (Resp. Br. ¶¶2, 6 at 8-9) directly contradicts the holding of the Court of Appeals. Thus, the Third Circuit, in amending 11 U.S.C. § 1114 to include the concept of "forced retirement" expressly refused to limit its holding to the facts of this case, but instead pronounced a *broad* rule so that "[t]he contours of such a concept as 'forced retirement' may receive appropriate interpretation, when it occurs, by a case-by-case development." (Pet. at 15a).

This open-ended judicial amendment created ambiguity and uncertainty with respect to the basic issue of who is covered by § 1114. That issue is now to be decided by multiple litigations rather than by the express language of the statute. Accordingly, the decision below is neither "narrow" nor *sui generis* as argued by the Respondents.

There Is No Preliminary Issue To Be Decided.

The Respondents argue that before this Court can reach any issue under § 1114, it must first decide whether the Agreements were executory and therefore could be rejected under 11 U.S.C. § 365(a). (Resp. Br. ¶3, at 8). According to the Respondents this issue should not be decided by this Court because it hadn't been raised by either party in the courts below. This argument is incorrect. In fact, the *Respondents themselves* raised the issue in the Bankruptcy Court. (Pet. at 56a, 59a). Having lost on this argument (*Id.* at 62a), the Respondents then abandoned it in both the District Court and the Court of Appeals. The respondents have thus waived this argument altogether.

The Third Circuit itself raised the issue *sua sponte*, and required the parties to submit supplemental papers on whether the Agreements were executory. The Court majority held (as did the Bankruptcy Court) that the Agreements were in fact executory and could thus be rejected under Section 365(a). (Pet. at 16a-18a). The Third Circuit's holding is entirely unexceptionable and, indeed, is in accord with this Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984) (Executory contract intended by Congress to mean "a contract 'on which performance remains due to some extent on both sides.'") Thus, there is no reason at all for this Court to have to decide this "threshold issue."

The Petitioner Did Not Waive The Fact That It Had Given Respondents Eleven Days Notice of Their Termination.

The Respondents allege that GDC has "waived", by not raising in the lower courts, its "central" argument that it had given the Respondents eleven days notice that they would be discharged and the Agreements terminated. (Resp. Br. ¶5 at 9).

GDC's notice to the Respondents is a factual matter, and not a legal argument, and can thus be "waived" *only* by not being in the record. In the present case, however, the contrary is true; GDC's notice to the Respondents is *a fact which was stipulated by the parties* and has been part of the record throughout these proceedings. Indeed, the Court of Appeals itself recognized that GDC had given such notice. (Pet. at 12a-13a n. 10). Accordingly, the Respondents' "waiver" argument is completely without merit.

The Respondents also assert that the advance notice given by GDC should be disregarded because such notice did not inform the Respondents that the Petitioner would make a motion under Section 365(a) to reject the Agreements. (Resp. Br. at 10-11). In fact, however, the parties *stipulated* that the Respondents "were advised that, among other things, the Debtors [GDC] intended to terminate the Benefit Agreements effective as of November 30, 2001." The Respondents' argument thus ignores the undisputed record.

A "Retired Employee" is a Person Who Has Voluntarily Withdrawn From Employment.

The Respondents have presented several "definitions" of "retire" which purportedly equate retirement with involuntary termination. (Resp. Br. at 11-13). These definitions are irrelevant to the express language of Section 1114.

Thus, Section 1114, by its terms, applies only to "retired employees". The ordinary and usual definition of retired is "withdrawn from or no longer occupied with one's business or profession." Random House Webster's Unabridged Dictionary (2001), at 1644. Similarly, "retire" is defined as "to withdraw from office, business, or active life, usually because of age." (*Id.*). Finally, "withdraw" is defined as "*to remove oneself*" from some activity, competition, etc." (*Id.* at 2183).

Accordingly, a "retired employee" is a person who has *removed him/herself* permanently from employment, usually because of age.

The equation of discharge without cause with "forced retirement" urged on this Court by the Respondents does violence to the plain meaning of "retired employee" and leads to unconscionable results because such a definition applies to *any* termination. Taken to its logical conclusion, the Respondents' argument means that Section 1114 applies where the affected employee was discharged without cause by a debtor at age 25 (i.e. "forced retirement"), even if such employee actively seeks and finds other work and therefore cannot be a "retired employee" under any rational definition of that term.

The cases cited by the Respondents on pages 11-13 of their Brief all involve the definition of "retire" in the context of specific State statutes or constitutional provisions, none of which remotely resemble Section 1114 either in express terms or in purpose. Indeed, in two of these cases, *Zachman v. Whirlpool Fin. Corp.*, 869 P.2d 1078 (Wash. 1994) and *Vawter, Kennedy & Kennedy, P.C. v. Vawter*, 776 S.W.2d 520 (Tenn. 1989), the Courts held that the relevant statutory/ constitutional provisions did not even require that the individual involved had to be actually retired, *i.e.* withdrawn from employment or from their trades or professions. Accordingly, these cases provide no insight as to the proper application of Section 1114.

There can be no question that the Respondents had not "retired" within the meaning of Section 1114. As Judge Pollack stated in his concurring opinion below, the Respondents "were employees of [GDC] when [GDC] filed under Chapter 11, and they remained employees until they were dismissed one day *after* [GDC] filed its 365 motion seeking to terminate the Benefit Plan". (Pet. at 23a). Under these circumstances, "§ 1114 is inapplicable". (*Id.* at 25a).

CONCLUSION

For all of the reasons stated above and in GDC's Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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